WESTERN LAW JOURNAL.

OCTOBER, 1847.

CONSTITUTIONAL LAW.

ROWAN ET AL. *v.* RUNNELS, 5 HOWARD, S. C. U. S. 134.

IT has been held in this case, that after a construction has been given to a clause in the Constitution of a State, by the Supreme Court of the United States, although, afterwards, a different construction shall be given by the Supreme Court of the State, and become the settled rule in the State Courts, the Supreme Court of the United States will not, on the question again arising, overrule their own decision, and adopt the rule thus settled, as to contracts entered into before the decision in the State Courts.

With the greatest deference to the decisions of the Supreme Court of the United States, an attempt will be made to show that the decision in the case above referred to, is not in accordance with principles laid down and acted on in former decisions of the same Court.

A clause in the Constitution, adopted by the State of Mississippi, in 1832, declares that "the introduction of slaves into that State, as merchandize, or for sale, shall be prohibited from and after the 1st day of May, 1833." The Legislature of Mississippi failed for several years to pass any law to enforce this provision of the Constitution. Slaves were introduced into the State after the 1st of May, 1833, for sale, and contracts of sale in relation to them were made; and the question arose whether such contracts were void, as being contrary to the prohibition of the Constitution.

In the case of *Groves* v. *Slaughter*, 15 *Pet.* 499, the Supreme Court

of the United States held, that the clause of the Constitution of the State of Mississippi, above quoted, was merely directory to the Legislature, and did not in itself amount to a prohibition. After this decision, the question came before the High Court of Errors and Appeals of the State of Mississippi, in the case of *Brien* v. *Williamson*, 7 *Howard Missi. Rep.* 14; and that Court held that this "prohibitory provision in the Constitution was not only binding and operative as such *per se*, but that it also established the policy of the State, and cannot be defeated either by legislative act or by contract." And it is not doubted, but that since this decision, such has been the settled construction of this clause in the Courts of the State of Mississippi.

It may be also remarked, that, before the decision of the case of *Groves* v. *Slaughter*, the construction of this clause had been considered by the High Court of Errors and Appeals in Mississippi, in several cases; and, though the Supreme Court of the United States, in *Groves* v. *Slaughter*, did not consider these cases as having established the rule of construction in the State, yet the Court of Errors and Appeals of Mississippi, in *Brien* v. *Williamson*, say that they had regarded the question as entirely settled by their former decisions, and in accordance with the decision then made.

Such also seems to have been the opinion entertained of these prior decisions of the High Court of Errors and Appeals of Mississippi, by the Supreme Court of Tennessee, in the case of *Yerger* v. *Rains*, 4 *Humph.* 259, a case which was held up to see whether the Court in Mississippi would follow the decision made in *Groves* v. *Slaughter*. And an extract from the opinion of the Court, in 4 *Humph.* 261, may be here properly inserted, as not only showing the light in which the decisions in Mississippi were regarded, but also as having a strong bearing on the question under consideration: "The High Court of Errors and Appeals of the State of Mississippi, upon full and elaborate discussion in the cases of *Green* v. *Robertson*, *Hite & Fitzpatrick* v. *Glidewell*, and *Cowan et al.* v. *Boyce et al.*, all reported in 5 *Howard*, had determined that the clause in question is not a mandate merely to the Legislature, but is an inhibition *per se*, and that all contracts for slaves, so introduced into the State after the 1st day of May, 1833, are void by virtue of that clause. The Supreme Court of the United States, as we have said, in the case of *Groves* v. *Slaughter*, hold the clause to be mandatory to the Legislature to prohibit the introduction of slaves, but not to be, by its own proper force, a prohibition. Since the publication of that opinion, the question has again come under the consideration of the Court of Errors and Appeals of Mississippi,

in the case of *John S. Bryan* v. *John B. Williamson*, determined in March last; and in an opinion delivered by Chief Justice Sharkey, which exhibits patient investigation, extensive research, and vigorous thought, the Court unanimously declare their adherence to their first conclusions. The law of Mississippi then, is, that the introduction of slaves into that State as merchandize, and their sale, are contrary to the public and constitutional policy of that State, and that therefore such introduction is a public wrong, and such sale void. That question the Courts of Mississippi have a right to determine; that question they conclusively determined. If our views with regard to the proper construction and legal effect of that portion of the Mississippi Constitution, differed from those of their Judges, it would be our duty cheerfully and promptly to surrender such views; and, concurring, as we do, with the Courts of Mississippi, in the correctness of the exposition made by them, it were idle and useless to attempt, by any reasoning or researches of our own, to fortify their position: they need it not."

Under these circumstances, the question again came before the Supreme Court of the United States, in *Rowan et al.* v. *Runnels*, 5 *Howard* 134. Mr. Chief Justice Taney, in delivering the opinion of the Court, referring to the case of *Groves* v. *Slaughter*, observed that the question in this case was precisely the same, and that since the decision of that case, the question had been settled differently in the Courts of the State. "And it is argued," he says, "that inasmuch as this Court adopts the construction given by the State Courts to their own Constitution and laws, we ought to follow the decisions in Mississippi, and declare the contract before us to be void, notwithstanding the case of *Groves* v. *Slaughter*. But we are not aware of any decision in this Court which presses the rule so far, or that would justify this Court in declaring contracts to be void upon this ground, which, upon the fullest consideration, it has so recently held to be good. It will be seen, by a reference to the opinion delivered in the case of *Groves* v. *Slaughter*, that the Court were satisfied not only that the construction it then placed on the Constitution of Mississippi was the true one, but that it conformed to the construction upon which the Legislature of the State had acted, and that the validity of these sales had not been brought into question in any of the tribunals of the State until long after the time when this contract was made; and that as late as the beginning of the year 1841, when *Groves* v. *Slaughter* was decided, it did not appear, from any thing before the Court, that the construction of the clause in question had been settled either way, by judicial decision, in the Courts of the State.

"Acting under the opinion thus deliberately given by this Court, we can hardly be required, by any comity or respect for the State Courts, to surrender our judgment to decisions since made in the State, and declare contracts to be void, which, upon full consideration, we have pronounced to be valid. Undoubtedly this Court will always feel itself bound to respect the decisions of the State Courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own Constitution and laws.

"But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this Court were lawfully made. For, if such rule were adopted, and the comity due to State decisions pushed to this extent, it is evident that the provision in the Constitution of the United States, which secures to the citizens of another State the right to sue in the Courts of the United States, might become utterly useless and nugatory."

The above extract contains the whole of the reasoning by which the decision of the Court is sustained; and without entering into any argument against the opinion of the learned Chief Justice, which might be deemed presumptuous, it may be excusable to remark, that an apparent forgetfulness of an elementary principle of law seems to pervade that opinion. The decision of a Court in any case is not *the law*, except of the particular case: when similar cases arise, it is only *evidence* of what the law is. Now it would seem that the reason why the Supreme Court of the United States have followed the decisions of the State Courts in relation to their own Constitutions and laws, is, that those decisions are the highest and best evidence of the intention of the framers of such Constitution and laws. The highest tribunals of each State are supposed to know the peculiar and local laws of such State—their proper interpretation and construction—the cases to which they are applicable—better than any other tribunal.

When the case of *Rowan et al.* v. *Runnels* came before the Supreme Court, its decision properly depended on the law of the place where the contract was made. The place of the contract was the State of Mississippi; and the question was, whether the Constitution of Mississippi permitted such a contract. What are the provisions in relation to the subject in that Constitution? In the case of *Groves* v. *Slaughter*, it was held that there were none forbidding such a contract. In *Brian* v. *Williamson*, it was held that a provision in the Constitution rendered such a contract void. Neither of these cases

has added to or subtracted from the provisions of the Constitution; and which of them is the highest and best evidence of what it contains?

It is admitted in the opinion of the Court, in the case under consideration, that from the time the decisions of the State Courts upon the construction of their own Constitution and laws are made, they are to be regarded as conclusive in all cases; but it is insisted that they are not to have a retroactive effect. If the decision of the Courts of Mississippi is the best evidence of what its Constitution contains in one case, why should it not be equally so in another? Can it be, that the same clause in the Constitution of Mississippi, meant one thing in 1836, and another in 1840? Are the Federal Courts hereafter to decide that a contract, made before the decision of the case of *Brien* v. *Williamson*, is valid, and that another, precisely similar, made after that decision, is void, both depending on the construction of the same clause in the Constitution of Mississippi?

But an argument as to the correctness of the opinion in the case of *Rowan et al.* v. *Runnels*, upon general principles, was not intended; and a reference will be made, as was proposed, to the cases in the same Court, which are believed to be in conflict with that opinion.

In the cases of *Patton's Lessee* v. *Easton*, 1 *Wheat.* 276, and *Powell's Lessee* v. *Green*, 2 *Pet.* 240, the Supreme Court of the United States decided on the construction of a Statute of Limitations of the State of Tennessee, passed in 1797. In the first case, a reference is made to two decisions of the Supreme Court of Tennessee, as having settled the construction of that act; and the Supreme Court of the United States not only followed, but expressed its concurrence in that construction. Afterwards, on the same question again arising in the Supreme Court of Tennessee, and on an elaborate review of the cases which had arisen under the statute, a different construction was given, and became the settled rule in the State of Tennessee. And then, the question again coming before the Supreme Court of the United States, in the case of *Green* v. *Lessee of Neal*, 6 *Pet.* 291, it is said, in the opinion of the Court, delivered by Mr. Justice McLean: "Had this been the settled construction of these statutes when the decision was made by this Court, in the case of *Patton's Lessee* v. *Easton*, there can be no doubt, that that opinion would have conformed to it. But the question is now raised, whether this Court will adhere to its own decision, made under the circumstances stated, or yield to that of the judicial tribunals of Tennessee. This point has never before been directly decided by this Court, on a question of general importance.

The cases are numerous where the Court have adopted the constructions given to the statute of a State by its supreme judicial tribunal; but it has never been decided that this Court will overrule their own adjudication, establishing an important rule of property, where it has been founded on the construction of a statute made in conformity to the decisions of the State at the time, so as to conform to a different construction adopted afterwards by the State.

"This is a question of grave import, and should be approached with great deliberation. It is deeply interesting in every point of view in which it may be considered. As a rule of property, it is important, and equally so as it regards the system under which the powers of this tribunal are exercised."

The learned Judge then cites several cases to show in what light the decisions of State Courts, in giving a construction to their own statutes, have been considered, and further proceeds to say: "It is admitted in the argument, that this Court, in giving a construction to a local law, will be influenced by the decisions of the local tribunals; but it is also contended, that when such a construction shall be given in conformity to those decisions, it must be considered final: that, if the State shall change the rule, it does not comport either with the consistency or dignity of this tribunal to adopt the change. Such a course, it is insisted, would recognize in the State Courts a power to revise the decisions of this Court, and fix the rule of property differently from its solemn adjudications: that the Federal Court, when sitting within a State, is a Court of that State, being so constituted by the Constitution and laws of the Union, and, as such, has an equal right with the State Courts to fix the construction of the local law.

"On all questions arising under the Constitution and laws of the Union, this Court may exercise a revising power; and its decisions are final and obligatory on all other judicial tribunals, State as well as Federal. A State tribunal has a right to examine any such questions, and to determine them; but its decision must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a State, should be considered as final by this Court—not because the State tribunal, in such a case, has any power to bind this Court, but because, in the language of the Court, in the case of *Shelby et al.* v. *Guy*, 11 *Wheat.* 361, 'a fixed and received construction by a State in its own Courts, makes a part of the statute law.'

"The same reason which influences this Court to adopt the con-

struction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the State tribunals should change the construction. A reference is here made, not to a single adjudication, but to a series of decisions which shall settle the rule. Are not the injurious effects on the interests of the citizens of a State, as great, in refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case, as well as in the other, has the effect to establish in the State two rules of property.

"Would not a change in the construction of a law of the United States, by this tribunal, be obligatory on the State Courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the last exposition of a local law by the State Court? The exposition forms a part of the local law, and is binding on all the people of the State, and its inferior judicial tribunals. It is emphatically the law of the State, which the Federal Court, while sitting within the State, and this Court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the Legislature of the State may modify the law, or repeal it.

"If the construction of the highest judicial tribunal of a State form a part of its statute law, as much as an enactment by the Legislature, how can this Court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply, where the judicial branch of the State government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had at first been given to it. The charge of inconsistency might be made with more force and propriety against the Federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law, which forms a part of it. It is no answer to this objection, that a different exposition was formerly given to the act which was adopted by the Federal Court. The inquiry is, what is the settled law of the State at the time the decision is made. This constitutes the rule of property within the State, by which the rights of litigant parties must be determined.

"As the Federal tribunals profess to be governed by this rule, they can never act inconsistently by enforcing it. If they change their decision, it is because the rule on which that decision was founded, has been changed." 6 *Pet.* 298, 299.

And the decision of the Circuit Court in the case of *Green* v. *Lessee of Neal*, having been governed by the former decisions of the Supreme Court of the United States, and not following the settled law of the State of Tennessee, was reversed.

It is said, in the opinion of the Court, in *Rowan et al.* v. *Runnels*, that they are not aware of any decision of that Court, which would press the rule of following the decisions of the State Courts, on the construction of their own Constitution and laws, so far as to require the Supreme Court of the United States to overrule its own decisions, made on full investigation, so as to follow a decision in the State Court, subsequently made, and settling the rule differently. It cannot be supposed that the Supreme Court of the United States were ignorant of their own important and interesting decision in the case of *Green* v. *Lessee of Neal;* and, as it might appear to some minds, that the principles decided in that case, and contained in the abstract given above, are in conflict with the decision in the case of *Rowan et al.* v. *Runnels*, it would have been more satisfactory, if the case of *Green* v. *Lessee of Neal* had been referred to in the opinion of the Court, and the points of difference in the principles involved in the two cases distinguished. It is to be regretted, therefore, that the case of *Green* v. *Lessee of Neal*, so far as appears from the report of the case of *Rowan et al.* v. *Runnels*, was not cited or referred to, either in the argument of counsel, or in the opinion of the Court.

SUPREME COURT OF OHIO: LUCAS COUNTY, AUGUST TERM, 1847.

[BEFORE JUDGES BIRCHARD AND AVERY.]

SCHOONER JANE LOUISA v. CHARLES H. WILLIAMS.

WATERCRAFT LAW—USAGE—EVIDENCE.

Where the usage of trade is for the consignor to direct the master, by memorandum on the bill of lading, to collect freight and charges of the consignee, and the master does so, the watercraft is liable for the same; and where there are duplicate bills of lading, it is sufficient to produce the one given to the master, though notice be given to produce the other.

THIS was an action brought by Williams, in the Court of Common Pleas, under the Watercraft law, allowing proceedings *in rem.*, and

upon the following state of facts. Williams, a forwarding merchant, at Toledo, consigned a quantity of flour, by defendant, to M. S. Hawley, a commission merchant, in Buffalo, with a direction, marked on the bill of lading, to the master, to collect of Hawley, on delivery, the charges of Williams, together with his advances made for canal charges, insurance, &c., that had accrued before delivery to defendant.

A demurrer was filed by defendant, which was overruled. At the trial, the plaintiff proved by the deposition of Hawley, the payment by Hawley to the master, of the charges according to the direction of the bill of lading shown him, and according to the custom of merchants in this trade.

The counsel for defendant then proved that it was the custom of merchants to make out duplicate bills of lading, one to be kept by the consignor, and one delivered to the master. He proved service of a notice on plaintiff's attorney to produce his copy of the bill of lading, and for want of compliance with it, objected to plaintiff's giving evidence of the contents of that kept by the master, and shown to Hawley, although plaintiff had proved service of a like notice upon the defendant, before reading Hawley's deposition. Judgment was given for plaintiff, in the Court of Common Pleas, and the defendant sued out a writ of error.

Tilden & Baker, for plaintiff Williams, cited *Kemp* v. *Coughtry*, 11 *Johns. Rep.* 107; *Canal Boat Huron* v. *Simmons*, 11 *O. R.* 458; *Emery* v. *Henry*, 4 *Greenl. Rep.* 407; *Abbott on Shipping*, *p.* 156; *Story on Agency*, § 116.

D. O. Morton, for Schooner.

By the Court. The declaration sets out a contract which the master was competent to enter into, and the proof brings the case within that clause to the statute which makes the vessel liable for damages arising out of the non-performance of any contract for the transportation of goods.

When the course of trade is such that the consignee, when so directed, pays the charges to the master, to be paid over to his immediate consignor on the return of the vessel, as is the custom in our lake trade, the contract of transportation is not performed until the money is paid over, and in default of payment the vessel is liable. The contract arises from the acts of the parties and the course of trade, and the owners of vessels embark in the trade with a view to

that custom, and it devolves upon them the necessity of selecting responsible officers. The contract is entire, and the collecting and paying over the charges is not a mere personal trust in the master, as contended for by defendant's counsel.

A proper foundation was laid for the introduction of secondary evidence of the contents of the bill of lading, although the plaintiff might also have had a copy.

An objection was also raised as to the competency of Hawley as a witness, but we cannot see that he was legally interested.

Judgment affirmed.

NOTE BY THE EDITORS. We avail ourselves of this occasion to furnish an abstract of all the cases thus far reported, in which the Watercraft law of Ohio has received a construction:

The Steamboat Monarch v. *Finley*, 10 *O. R.* 385. This was an action of assumpsit against the boat by name. The declaration was in the usual form, and the plea was the general issue in the name of the boat. On the trial, it appeared that some of the items of the account were contracted prior to the passage of the law. *Held*, 1. That the pleadings were right; 2. that debts contracted before the passage of the law were not within its provisions.

Canal Boat Huron v. *Simmons*, 11 *O. R.* 458. This was assumpsit against the boat by name, for provisions, such as sugar, flour, potatoes, and the like, furnished to the master for the use of the boat. *Held*, that such claim was within the statute.

Lewis v. *the Schooner Cleveland*, 12 *O. R.* 341. This was assumpsit against the schooner by name, for work and labor done by the plaintiff as a seaman. *Held*, that seamen's wages are within the spirit, if not the strict letter of the statute, and this action may be maintained. This case comes within the principle of *Canal Boat Huron* v. *Simmons*, 11 *O. R.* 458.

Steamboat Waverley v. *Clements*, 14 *O. R.* 28. The owners of a boat, after contracting a debt for which she might have been sued by name, sold her with notice of this debt. *Held*, that the boat still remained liable to a suit for this debt, in the hands of the purchaser with notice.

Jones v. *the Steamboat Commerce*, 14 *O. R.* 408. The boat had been sued, judgment recovered, and a sale made under this judgment. The boat was again seized for a debt incurred before the judicial sale. *Held*, 1. That there is no lien until seizure, which alone determines the priority; 2. that the purchaser at a judicial sale, takes the boat free from all claim for pre-existing debts.

Kellogg et al. v. *Brennan et al.*, 14 *O. R.* 72. The original owners of the Steamboat Walnut Hills, mortgaged her for debts contracted in building her. Afterwards, with consent of creditors, the boat was sold, a new mortgage given, and new debts subsequently contracted on account of the boat, for which judgments had been recovered against her by name. On bill to foreclose the new mortgage, *held*, that the mortgagees had not a lien preferable to the claims of the new creditors.

Canal Boat Etna v. *Treat*, 15 *O. R.* 585. This was an action of assumpsit against the boat by name, for materials, supplies, and labor, expended in building the same. Treat had contracted to build and deliver the boat, for a specific price, and had delivered it. *Held*, that he could not maintain this action against the boat, because, until delivery, he was owner.

Goodsell v. the Brig St. Louis, 4 *West. Law Jour.* 173. This was assumpsit, in the Court of Common Pleas of Lucas County, Ohio, July term, 1846, for labor and materials furnished for repairing the brig in the State of Michigan, which brig was in the custom of navigating the lakes from Buffalo to Detroit. *Held*, that our statute does not include debts contracted in another State, and that it is wholly immaterial whether or not the brig would have been liable under the laws of the State where the debt was contracted.

The Steamboat Arkansas Mail v. *Fox*, 4 *West. Law Jour.* 527. This was an action of assumpsit against the boat by name, on a duebill given in the name of the boat and owners, signed by the master, for money borrowed. *Held*, that this was within the statute, unless it were proved that the money was not borrowed for the use of the boat.

W.

TENANCIES FROM YEAR TO YEAR IN OHIO.

[By N. Headington.]

It has already been said, that the common law notice to quit, as far as its duration is concerned at least, is not an essential part of the doctrine of tenancies from year to year; and that in many of the States it has been either supplied or altered by statute. *See further*, 1 *Hilliard on Real Property*, 278, 283. Such tenancies indeed arose out of the resolution of the Courts, that a reasonable notice must be given to determine an estate at will, which was finally settled to be a notice of six months, expiring with the year of the tenancy. Although the security of the tenant in his possession, for each successive year, is owing merely to the inability thus imposed upon the landlord to deprive him of it, except at the end of the year, and the tacit renovation of the contract for the premises from year to year, is simply the result of the rule, that a tenancy at will is presumed to continue, unless there is a termination of the will, in connection with the rule thus introduced, that the only regular evidence thereof is a six months' notice to quit,—these consequences did not depend on the exact length of the notice, which, although regulated upon principles of general convenience, was in this respect necessarily arbitrary, and may therefore be varied, whilst tenancies from year to year, with all their other qualities, are preserved. The adoption in Ohio, then, of the common law regulating tenancies from year to year, does not unavoidably require the existence of the common law notice to quit, but is consistent with a statutory notice. And there is more reason to doubt, whether, thus far, it has not been modified by statute, than to deny its general obligation. The acknowledgment of strict tenancies at will, is a direct and necessary consequence of the latter. Many persons, however, who would not admit the correctness of the position in which they would thereby be placed, still hold that no other notice need be given to a tenant than such as is provided for in the statutes regulating the remedies by means of which he may be evicted. The ten days' notice to the tenant in possession, in an action of ejectment, without which a recovery cannot be had against the casual ejector, has already been incidentally considered; and it has been seen that this notice can in no respect supersede the notice to quit between landlord and tenant—the one

applying to the case where there is already a right of entry in the plaintiff, and the object of the other being to determine the estate of the tenant, by which means the landlord may acquire a right of entry. The only other proceeding against a refractory tenant, known to our law, is that created by the forcible entry and detainer act, which also requires a notice to be given. Inasmuch, however, as the notice has not always formed a part of this statutory proceeding, and inasmuch as the action of ejectment is still in all cases a concurrent remedy therewith, it will be proper to inquire, first, whether the common law notice prevailed prior to and aside from the statute, and afterwards whether any change was effected by the latter.

At a very early period, it was determined, that a general occupation was an occupation from year to year, and that the tenant could not be turned out of possession without a reasonable notice to quit. 7 *T, R.* 85, *per Lord Kenyon.* Although this was the form which the rule most naturally assumed when first introduced, the inconveniencies arising from its generality, must have been soon experienced. The reasonableness of the notice seems indeed to have been always regarded as a question of law, to be decided by the Court upon the facts of the case. But the difficulty was felt at once, of arriving at any principle which could be adopted and used in all or any considerable numbers of the cases that would arise. From the infinite variety of the circumstances that might attend the occupation, an exact parallelism could never be expected to occur. It became necessary then, to determine each case upon its own peculiar circumstances, or to establish a rule, which, to a certain extent, would be merely arbitrary. The difficulty and embarrassment found in pursuing the former course, was not the only or the greatest evil attendant upon it. It must have produced that uncertainty and confusion always connected with decisions depending merely upon the discretion of the Court pronouncing them,—compelling the parties on whom they are to operate, to act at their peril in the first instance, without being able to anticipate the consequences that may be held to result, and forcibly illustrating the truth and value of the maxim, that a bad rule is often better than none at all. The interests of the community then, as well as the convenience of the Judges, required that some certain and general rule of decision should be adopted. That which was fixed upon, and has since become so well grounded in authority, was, that a six

months' notice should be given to a tenant from year to year, and a corresponding notice of less duration, where the holding was at shorter intervals. It has been truly remarked, that with regard to what may be considered a reasonable notice, it would be difficult to say why six months, or any other particular time, should be held to be reasonable notice, rather than a few days or months, more or less. *Putnam, J.*, 2 *Pick.* 77, *note.* Yet it cannot be supposed that this length of time was adopted at first purely by accident, and has since been followed for this reason alone. On the contrary, it was adapted to the ordinary course of husbandry, being usually required to complete all the preparations for a removal without prejudice to the tenant or injury to the premises occupied. *Ib.* 78, *note.* The necessity of a notice of some kind, where tenancies from year to year exist, is obvious, else they would be indefinite in their duration, there being no other means to prevent their continuing to run. And, aside from any statutory provision, either the old and indefinite rule, requiring a reasonable notice, must be revived, or some more certain and definite rule established. To fall back upon the former, would but restore all the embarrassments incident thereto. The difficulty of this position was fully realized by the Supreme Court of Massachusetts, when assumed by them in *Ellis* v. *Paige*, 1 *Pick.* 49, and gave rise to the declaration, that "no right which is capable of being defined and limited, ought ever to depend on the discretion of the Judges;" and also to this admission: "We shall hereafter probably find it necessary to frame some rule applicable to cases if this sort, should we not be prevented by the intervention of the Legislature." A notice, certain in its extent, being indispensable, therefore, in determining its duration, the question will occur, what precise time shall be adopted—what reason is there for any particular period rather than a few days or weeks, more or less? These inquiries might originally have been urged against the period of six months, as they now may be against any other definite length of time. But there is a reason now, independently of the causes that pointed out its appropriateness in the first instance—independently of the fact that it has since been found convenient in practice—a reason which did not then exist, and which is inapplicable to any other period of time, that is conclusive in favor of the notice for six months—the simple fact that it has already been established, that it has become a part of the common law. Our Courts cannot adhere to the general rule, merely that a reasonable notice shall be given—they cannot adopt a definite

notice of any other duration, so long as it is admitted that the common law is in force in Ohio, and that a six months' notice to quit is required thereby, unless so plain a want of adaptation to our circumstances can be made to appear as would justify its rejection in any other respect. The latter point need not be again referred to. Not only can this not be done, but it is believed that directly the opposite is true. At any rate, it would be well to consider beforehand, whether any other length of time could be agreed upon that would not be liable to the same objection, or would be equally satisfactory or beneficial. Unless altered or annulled by statute, then the common law notice is obligatory in Ohio, as a part of the doctrine of tenancies from year to year; and the question returns, whether this effect can be attributed to our statute of forcible entry and detainer.

The forcible entry and detainer act of Ohio was originally adopted from the law of Massachusetts, in 1795. *Chase's Stat.* 188. It has since been repeatedly amended and revised, but the substance of it is still preserved. An amendment was introduced in 1821, declaring "that where forcible detainer, without forcible entry, shall be alleged in the complaint, it shall be the duty of the complainant to notify the defendant, at least ten days prior to issuing the writ, to leave the premises. *Chase*, 1210. This provision was re-enacted in the statutes of 1824 and '31. *Chase*, 1360, 1766. The latter is the general law now in force, except so far as it has been altered by the amendatory acts of 1843, '4, '5, '6. 41 *O. L.* 78; 42 *O. L.* 4; 43 *O. L.* 7; 44 *O. L.* 69. The length of notice has thereby been reduced to three days, and it has been extended to cases of forcible entry and detainer as well as cases of forcible detainer only.

To show that these statutes were not meant to interfere with or supersede the common law notice to quit, it will be sufficient to refer to a long known and well approved rule of construction, which is, that a statute shall not be extended by implication to repeal a former law, unless there is a necessary repugnancy between them. "Where the common law and the statute differ, the common law gives place to the statute; and an old statute gives place to a new one." "But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative." "But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy." 1 *Blacks. Com.* 89. The

same rule is for our purpose more directly expressed, and in strong and comprehensive terms, when it is said in the old books, "that an affirmative statute does not take away the common law." *Bac. Abr. Stat. G.; Com. Dig. Parl.* (*R.* 23); *Thomas' Coke*, 30, [*Har. n.* 8, 115, *a* (153.)] According to the common law of Ohio, a tenant from year to year could not be deprived of his possession until after a regular six months' notice to quit had been given and expired. A statutory remedy by writ of forcible detainer, has been enacted, however, which may be resorted to against a tenant of this character, when coming within its operation. An affirmative provision of the statute requires the complainant to give notice to the defendant to leave the premises three days before issuing the writ. But the common law notice is not expressly repealed thereby; it is not even referred to in any manner, and there is no inconsistency between the two, since both may be given. The construction, then, which would make this provision annul the common law notice, would be forced and unnatural in itself, and in direct violation of a well settled rule.

A more particular examination of the statutes, will, it is believed, confirm the conclusion which thus appears to be dictated by general principles. Jurisdiction is conferred thereby to inquire "as well against those who make unlawful and forcible entry into lands and tenements, and detain the same as against those, who, having a lawful and peaceable entry into lands and tenements, unlawfully and by force hold the same." *Swan*, 417; 41 *O. L.* 78. None of the acts that have been passed upon this subject have ever defined what would constitute a forcible entry or a forcible detainer. In order to ascertain the meaning of these terms, it will be necessary to resort to the common law, whence they are borrowed, or rather, to the interpretation which has been given the English and American statutes, made in the like case. Under the English law, it is said, that "a forcible entry must regularly be with a strong hand, with unusual weapons, or with menace of life or limb." 3 *Bac. Abr.* 252. And again—"it seems clear that it ought to be accompanied with some circumstances of actual violence or terror." 1 *Hawk. P. C. c.* 28, § 25. The American authorities are to the same effect: 10 *Mass.* 403; 17 *Wend.* 257; 4 *Bibb* 192, 312; 3 *A. K. Marsh.* 296; 7 *Halst.* 202, 266. This construction has been fully recognized in Ohio: *Yager* v. *Wilber*, 8 *O. R.* 398. The earlier English statutes, 5 and 15 *R.* 2, were merely criminal in their nature, and punished all

force of this kind without any way regarding what estate the party had on whom it was made. 3 *Bac.* 249, 256. A civil remedy by restitution of possession was engrafted on the criminal proceeding by the 8 *Hen.* 6; but from the language used, it was held to apply only to those having an estate of freehold. *Ib.* 250, 256. It was afterwards extended to tenants for term of years, &c. *Ib.* 251. The statutes in this country, copied after those in England, are in like manner limited in their scope. 13 *John.* 340. Although the remedy was only given to those who had a particular estate, it operated to prevent every entry by force upon such persons, whether under claim of right or not. "The object in all these cases is not to try the right, but to repress force, even where exerted under color of right, and to induce men to apply to the laws for relief instead of seeking to do themselves justice especially by means which the law abhors." 8 *O. R.* 400. It is accordingly well settled, that the title cannot be investigated in an action of forcible entry and detainer; the defendant cannot give evidence of title in himself in order to defeat the action. 1 *Hawk. c.* 28, §§ 38 *and* 56; 1 *Dall.* 68; 2 *Caines* 99; 11 *John.* 504; 8 *Cow.* 232; 4 *Bibb* 192, 312; 4 *Conn.* 79; 6 *ib.* 78. The statutes of Ohio are not confined in their application to any enumerated classes of persons; and it may therefore be concluded that under them every forcible entry upon the possession of another, whether by one having a right of entry or not, is *unlawful*, and subject to redress.

It will not be as easy to arrive at a satisfactory result in inquiring what cases are included by the terms, unlawful and forcible detainer. The books are full of authorities to show that the same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also; and some circumstance of the kind seems to be essential. 3 *Bac.* 253; 1 *Hawk. c.* 28, § 30; 8 *Cow.* 226; 10 *Mass.* 403; 3 *A. K. Marsh.* 296; 7 *Halst.* 202, 266. It was held in Massachusetts, under the statute from which our own law is derived, that "there must be some apparent violence offered in deed or word to the person of another; or the party must be furnished with unusual offensive weapons, or attended by an unusual multitude of people; all which circumstances would tend to excite terror in the owner, and prevent him from claiming or maintaining his right." 10 *Mass.* 409. It is very clear, however, that every forcible detainer is not *unlawful*. A person rightfully in pos-

session of his own property, may lawfully retain that possession by force against another who attempts to deprive him of it. It would seem necessary therefore in these cases, to ascertain to whom the legal right of possession or title belonged. The objection occurs at once, however, that the title cannot be considered or decided upon. *See authorities above cited* "It is not the title, but the possession, which is in question." 1 *Hawk. c.* 28, § 30. "The estate or merits of the title cannot be inquired into." 7 *Halst.* 199. The peace of the community requires that the quiet possessor of real property shall be protected in his possession, and that those having a claim thereto shall be compelled to resort to the law for redress. This principle applies not only to the case where the entry itself is forcible, but to the case where the intrusion is without violence, and there is afterwards a forcible holding out against the party upon whom it was made. The tendency and probable effect of each is to produce a breach of the peace. In the latter case, as well as in the former, the possession, if obtained without any color of right, by a mere trespasser, should be restored as speedily as possible, and without the delay incident to a remedy in which the title is properly examinable; if by one having a claim of title, he should not be permitted to judge of and enforce it himself, but having been deprived of the advantage which he has unfairly and by violence obtained over another, who has had no opportunity to contest such claim, should be required to assert the same in a Court of Justice, where the rights of each may be fully examined. The very nature and object of this summary proceeding would be destroyed therefore by permitting in any case an inquiry into the merits of the title.

In order to maintain an action of forcible detainer, however, it is requisite, in addition to the circumstances of violence or terror, in holding the premises, that a peaceable entry thereon by the defendant should be proved. He must have made an entry at some time and in some manner, or he could not have acquired the possession; and possession appearing without its origin being shown, it would be presumed to be lawful until the contrary was made to appear. If force had been used in the first instance, although continued afterwards, the offence would be forcible entry and detainer, and not forcible detainer only. "Forcible detainer is where a man who enters peaceably, afterwards detains his possession by force." 9 *Petersdorff's Abr.* 725. "It hath been resolved that an indictment of forcible detainer, without showing that the defendant made an

entry into the same lands, is not good; because the statute does not prohibit one who hath always been in possession to maintain the same with force." 1 *Hawk. c.* 28, § 40. It has been said, moreover, that the indictment ought to show that the entry was made on the possession of some person who had some estate in the premises, "else it doth not appear that such entry was injurious to any one." 3 *Bac.* 256; 1 *Hawk. c.* 28, § 38. By the statute of Ohio, a previous "lawful and peaceable entry" is made a part of the description of the unlawful and forcible detainer thereby prohibited.

In the next place, it is necessary to prove that such entry was made on the possession of the plaintiff. The possession of the defendant affords *prima facie* evidence of title in him, which can only be overcome in two ways: first, by direct proof of title in the plaintiff, independent of the possession; and secondly, by showing that the plaintiff had a prior possession of the premises. The former is not allowable, however. It is essential therefore that there should have been an actual possession in the plaintiff previous to that of the defendant, which had not been abandoned at the time of the entry. Such possession would be sufficient evidence of title to enable him to recover in an action of ejectment against one who could not show a better title. *Til. Ad. on Eject.* 32 *and* 77, *notes.* It shifts the presumption of title from the defendant to himself, and reverses the operation of the rule which prohibits an examination into its merits, bringing it to bear in his favor. The necessity of an actual possession in the plaintiff, at the time the entry is made, is fully established by the authorities. 3 *Bac.* 257, 258; 1 *Hawk. c.* 28, §§ 38, 40, 46; 1 *Caines* 128; 2 *ib.* 98; 2 *South.* 513; 1 *Port.* 144; 9 *Wend.* 50; 3 *Pick.* 31; 3 *Halst.* 48; 2 *Dana* 245. "Restitution shall only be to one who was only seized in law as to an heir on whom a stranger awarded to him who is found by the indictment to have been put out of *actual* possession, and consequently it shall not be awarded abateth upon the death of his ancestor, before any actual entry made by such heir." 3 *Bac.* 258. "That the plaintiff in forcible entry or forcible detainer, must have either a possession in fact, or law to maintain his suit, is too manifest to require argument or authority to prove. A mere claim, or right of possession, will not be sufficient: it must be a right in possession which is disturbed, and for which the action is brought." 2 *South* 515. The cases in 1 *Caines* and 3 *Pickering*, where there had been a forcible detainer merely, are directly in point to show that, in order to constitute this offence, there must have been a previous possession in the

plaintiff, and also that the defendant must have entered on such possession. The injury sought to be redressed, is an injury to the possession; and since it can only be sustained by the party who is actually in possession, the remedy is only given to him.

[To be concluded in the next number of the Journal.]

COURT OF COMMON PLEAS: HAMILTON CO., OHIO—JUNE TERM, 1847.

EPHRAIM GOODRICH *v.* JOHN ROGERS, OWNER OF THE STEAMBOAT DANUBE, AND JACOB STRADER, ONWER OF THE STEAMBOAT MCFARLAND.

COLLISION—JOINDER OF PARTIES.

The owners of two Steamboats, though owning no interest in each other's boats, nor personally present at the time, are jointly and severally liable for injuries to the person of a third innocent party, by a collision between their two boats, occasioned by the carelessness of their two pilots while navigating the Mississippi river.

THIS was an action on the case, for injuries to the person of plaintiff by the collision of the above named boats.

The declaration stated, in substance as follows: That on the 1st day of July, 1839, John Rogers owned the Steamboat Danube, and Jacob Strader owned the Steamboat McFarland; that they were, as common carriers, navigating their said boats, by their servants upon the Mississippi river; that the plaintiff was a passenger on the McFarland, whose owner, for hire and reward, had undertaken to carry him safely from New Orleans to Cincinnati; and that the defendants, then and there by their servants, so negligently managed and navigated their said boats, viz., the said Rogers, by his servants, the Steamboat Danube, and the said Strader, by his servants, the Steamboat McFarland, that the said boats then and there came into collision, with force and violence, whereby the plaintiff lost the use of his hand, and was much bruised, and made sick, and subjected to loss and expense. Damages laid at $12,000.

To this declaration each of the defendants pleaded separately by separate attorneys: 1. Not guilty; 2. the statute of limitations, which provides that all actions not therein enumerated, shall be brought within four years, &c.

The plaintiff joined issue on the pleas of not guilty, and demurred to the pleas of the statute of limitations, which demurrers were sustained; and the cause went before the jury at the May term, 1847.

The proof was, that about 1 o'clock, on the morning of the 18th of June, 1839, at Walnut Bend, in the Mississippi river, the two boats ran together with such violence as to sink the McFarland almost immediately; that the plaintiff, a passenger on her, in endeavoring to extricate himself, in the confusion caused thereby, had his hand so mashed and torn by some part of the boat, as to be of very little use to him for life; and that he suffered and lost greatly by the accident. Proof was given tending to show the amount of actual damage sustained; and it was admitted by the defendants that the Danube belonged to Rogers, and the McFarland to Strader.

The defendant Rogers then introduced proof tending to show that his pilot was not in fault, and did not contribute, by his negligence, to the injury of the plaintiff, but that it was caused solely by the conduct of the other boat.

The defendant, Strader, introduced proof tending to show that his pilot was not in fault, and did not contribute by his negligence to the injury of the plaintiff, but that the collision was caused solely by the negligence of the Danube.

It was admitted by the plaintiff, that neither John Rogers nor Jacob Strader was present in person at the time or place of collision.

The plaintiffs then introduced proof tending to show that the collision was caused by the negligence of both pilots, and that by proper care and precaution, the collision would not have happened.

There was, as usual in collision trials, much apparently conflicting testimony, not susceptible of explanation, as to which boat contributed to the collision, which need not be stated here.

The jury found both defendants guilty, and assessed the plaintiff's actual damages at $3,250: whereupon motions were made by each defendant, 1. in arrest of judgment; 2. for a new trial.

The reasons assigned for arrest of judgment were as follows:

1. That a joint verdict in this action cannot be rendered against the owners of the two Steamboats for the damages arising to a third person, from the negligence of their several pilots in coming into collision; because the owner of one boat cannot be made liable for the negligence of the pilot of another boat, owned by a different person, and whom he did not employ, and over whom he had no control.

2. Because the declaration disclosing a contract of safe carriage between the plaintiff and the McFarland, the plaintiff having also proved that contract, is compelled to rely upon that contract and the breach of it as his sole cause of action against that boat—whereas there being no such contract with the Danube, his cause of action against her owner is founded upon a pure tort, unconnected with contract; and the two causes of action cannot be prosecuted together in one suit. The plaintiff cannot waive the tort arising from the breach of his contract with the McFarland, and make her liable for a tort like that of the Danube, unconnected with his peculiar relation of passenger to his carrier. Having alleged and proved a breach of such contract, he is bound to rely upon that solely as his cause of action against the McFarland. He has therefore no right to set up a common cause of action under this declaration, against the owners of both boats.

3. Admitting that both pilots neglected their duty, and that the collision caused thereby injured the person of the plaintiff, and admitting that an owner is liable for injuries sustained by third persons by the negligence of his pilot; still, from the nature of the case, in the absence of statutory provisions on the subject, and of any adjudicated case to be found in point, there can be no joint action against the two separate owners, to recover the damages occasioned by such negligence, upon the general principle of the common law, that a joint tort requires a joint *consent*, *aim*, and *intention*, among the several tort feasers *to do the act* which occasions the damage: and though the plaintiff has suffered from the act of the two pilots, or the collision, yet it was not a joint act, because there was no joint intention: in other words, *there was no such thing known to the law as a joint negligent tort.*

We omit the reply of plaintiff's counsel to the above positions, as the substance of their argument is contained in the opinion of the Court, with additional reasons of the Court itself.

The counsel for plaintiff cited 1 *Chit. Pl.* 66, 74, 124, 135, 190, 432; 7 *E. C. L. R.* 346; 1 *O. R.* 47; *Barr's Pa. State R.* 47; 39 *E. C. L. R.* 233; 2 *McLean R.* 149; 1 *Blackf.* 139; 5 *Johns. R.* 280; 2 *O. R.* 33; 1 *Johns. R.* 290; *Story on Agency*, § 454; 3 *Wend.* 158; 2 *Ste. N. Pr.* 1023; 4 *Serj. & Rawle* 17; 3 *Ste. N. Pr.* 2237; 2 *ib.* 1024; 2 *Sumner* 567; 7 *Hill.*

The counsel for defendants cited 1 *Hill* 480; 12 *E. C. L. R.* 198; 1 *Mee. & Wels.* 504; 2 *Carr & Payne* 417; 3 *Ste. N. Pr.* 2339; 6 *Wharton* 313; 2 *Pick.* 621; *Story on Bail*, § 601; 8 *T. R.* 186; 20

Pick. 479; 2 *O. R.* 169; 21 *Wend.* 615; 6 *Hill* 592; 3 *Mee. & Wels.* 244; *Story on Agency*, § 308; 2 *E. C. L. R.* 697; 6 *Co. R.* 5, *Hayden's Case;* 10 *Mee. & Wels.* 114; 3 *Man. & Gr.* 53, *in* 42 *E. C. L. R.* 40; 9 *Watts & Serj.* 32; *Abbott on Shipping;* 6 *Hill* 592; *Wright* v. *Lathrop*, *in* 2 *O. R.; Story on Agency*, § 398 & 456, *and note;* 2 *Vern. R.* 9; 20 *Pick.* 478; 2 *Conn.* 206; 38 *E. C. L. R.* 593; 5 *Barn. & Cres.* 547; 12 *E. C. L. R.* 311; 6 *Mee. & Wels.* 497; 4 *Metcf.* 49; 3 *B. & A.* 304, *in* 5 *E. C. L. R.* 295; 5 *O. R.* 410; 12 *Pick.* 176.

Messrs. Eaton & Justice, Chase & Ball, and E. P. Cranch, for the plaintiff; Messrs. Gholson & Miner, and T. Walker, for the defendant Strader; Messrs. Fox and Lincoln, for the defendant Rogers.

Caldwell, P. J., charged the jury in substance as follows: That all owners of boats navigating the Mississippi river, as common carriers, are bound so to use their right as not to cause injury to others; that the carelessness of the two pilots was a joint violation of this great duty, which they owed the public; that the plaintiff, as a lawful traveler on the river, has a right to enforce that duty upon any or all who violated it; and that in actions *ex dilicto*, as the present is, all who joined in the act which caused the injury, are jointly and severally liable for the consequences of that act. The sole questions are, what damage did the act cause the plaintiff, and who did the act? If the act were caused by the negligence of both pilots, both owners are liable; and each is liable for the whole damage.

Where the collision is one entire act, and the injury suffered by the the plaintiff is one entire injury, it is impossible to say how much of that injury was done by one boat, and how much by the other. Each one who contributed to it is liable for the whole, and all are jointly liable. It is a general rule, in actions sounding in tort, that all who join in a tortious act, are jointly and severally liable for the damages. If the tortious act be negligently done by pilots of Steamboats, the law simply substitutes the owners for the pilots as defendants, in order to hold them liable for the consequences. The plaintiff alleged and proved a contract with one of the boats to be carried as a passenger to Cincinnati, and was at the moment of collision on board of her as such passenger. He does not, however, rely upon the breach of that contract for his cause of action against her owner, nor is he compelled to do so. There are rights and duties far above any contract, and which cannot be strength-

ened or taken away by contract. Of such nature are the rights and duties disclosed in this declaration, and arising out of the facts there stated. It is the right of every citizen to use the great highway of the Mississippi river to travel from port to port. It is the duty of every citizen to so use that right, as to injure no other man by his carelessness or ignorance in navigation. If there was a joint violation of this rule of law by the two pilots, there was a joint tort committed, for which their owners are jointly liable. In order that two defendants may be joined in an action of tort, it is sufficient that the declaration discloses a tortious act, in which they could in point of law and fact have joined; and to justify a joint verdict against any two of them, the jury must believe those two did join in the act which caused the injury.

Motion in arrest of judgment overruled, and judgment entered for amount of verdict.

Bills of exceptions were signed by the Court at the request of each defendant.

LAFOREST *V.* WALL.

THIS case, reported in 16 *L. J. R.* 100, was an action of assumpsit on a bill of exchange by endorsee against acceptor. Plea, that the bill was accepted for the accommodation of the drawer, and without any consideration; and that at the commencement of the suit, the plaintiff was the holder, without consideration. Replication, *de injuria. Held*, by the Court of Queen's Bench, to be a good replication. *Vide Isaac* v. *Farran*, 1 *M. & W.* 65; *Purchell* v. *Salter*, 1 *O. B.* 197, *s. c.* 41 *E. C. L.* 501; *Cowper* v. *Garbett*, 13 *M. & W.* 33.

CIRCUIT COURT OF THE UNITED STATES: JULY TERM, 1847.

DRISKILL *v.* PARRISH. *

Where a written power of attorney is given to an agent, authorizing him to arrest a fugitive from labor, and he acts under such power in attempting to make the arrest, the power must be produced, or its contents proved, in an action against an individual for hindering the arrest.

No one incurs the penalty under the act of Congress for hindering or obstructing the arrest, who does not act "knowingly."

He must have notice that the colored persons are fugitives from labor, and that the agent has authority to arrest them.

The principle is the same, whether the arrest be made with the view of removing the fugitives out of the State, or taking them before a judicial officer.

The power of attorney is in the nature of process, and should be shown, if demanded.

No one incurs the penalty who hinders an arrest by persons who have no authority to make it.

To obstruct the arrest is an offence, and the guilt of the party charged should be clearly established.

There can be but one penalty for the same act, in hindering an arrest, of one or many fugitives from labor: and so of harboring one or many at the same time.

The penalty is not given as a compensation to the master, but as a punishment for the offence.

To harbor or conceal, under the statute, there must be a manifest design to elude the claim of the master.

An open and fair action, with an intention to procure a fair legal hearing for the fugitive, is no violation of the act.

Mr. STANBERY for plaintiff; Messrs. LANE and CHASE for defendant.

OPINION OF THE COURT. This action is brought under the fourth section of the act of Congress of 1793, respecting fugitives from labor.

The section provides, "that any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor," &c., "or shall

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* This case will be in the forthcoming (third) volume of McLean's Reports, now in press.

harbor or conceal such person after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars."

The declaration contains four counts: two for hindering and obstructing the arrest of Jane Garretson, a colored woman, and her son, slaves of the plaintiff, who were fugitives from labor; and two counts for harboring and concealing them.

The defendant pleaded not guilty.

Col. Mitchell, a witness, states that he called with Driskill, son of the plaintiff, at defendant's house in Sandusky City, and inquired of him whether a colored woman, named Jane Garretson, was there. The defendant answered she was. The witness then asked if he could see her: defendant replied yes, if she wishes it. Witness said, "she was a slave of Peter Driskill, had escaped from her master, and that he was authorized to take her to Kentucky." The defendant went into the house and soon returned, the woman following him. She recognized the witness, spoke to him, and was approaching him, when the defendant interposed his hand, though he did not touch her.

She called young Driskill Master Jackson. Some conversation was had respecting the death of her young mistress, who had died, as she said, before she left Kentucky.

The boy was then asked for, and he was brought out. He also knew the witness and Driskill, and by his approach seemed to wish to shake hands with the witness, when the defendant interposed his hand, and said it was not necessary to shake hands.

The witness then claimed the right to arrest these two persons, to take them before some judicial officer, and show the right of the plaintiff to their services. The defendant asked by what authority: the witness replied, by virtue of a power of attorney from the master, and laid his hand upon the paper. The defendant objected to the authority, and said that nothing less than judicial authority was sufficient, or would satisfy him. He then by words or signs directed the woman and her son to return into the house, which they did, and he followed them, shutting the door after him.

The witness states that he lives near to the farm of the plaintiff in Kentucky, and is well acquainted with Jane and her son, and that they are the slaves of the plaintiff; that they absconded from his service some months before, with other colored persons owned by him.

Driskill being sworn, with less minuteness, relates the leading

facts as stated by Col. Mitchell. He differs from Mitchell in saying that the defendant pushed Jane and her son into the house.

Sarah Gustin was an inmate of the defendant's house. She stood in the passage, and heard a part of the conversation. She heard the defendant say to Col. Mitchell, that he could not take the colored persons unless he had lawful authority.

Parol evidence was then offered to prove the authority of Col. Mitchell to arrest the fugitives, as agent of the plaintiff. This was objected to by the defendant, on the ground that the authority was in writing, and consequently could not be proved by parol.

This is an important question. Mitchell did not claim to act in his own right, but as the agent of the plaintiff, and he referred to a written power of attorney as his authority. The defendant can take no exception to the power, from the fact that it was not shown to him. He declined an examination of it, alleging that judicial authority was required to make the arrest. In this he was mis taken; and his error, in this respect, constitutes no excuse. The question is not strictly whether a parol authority may not authorize an arrest of a fugitive from labor, but whether a written authority may be abandoned, and a parol one substituted. We are aware that there are many things in writing which may be proved by parol, without proof of the loss of the writing. But does this power of attorney come within this rule?

In the case of *Johnson* v. *Tompkins*, *Baldw. Rep.* 581, it is said, "if the person arrested is not a servant or slave, or the person making the arrest has not the authority of the master for so doing, he is in either case liable for the illegal arrest." And Mr. Justice Washington, in 4 *Wash.* 329, says, "that it was sufficient to bring the defendant within the provisions of the law, if having notice either by the verbal declarations of those who had the fugitive in custody, or were attempting to seize him; or by circumstances brought home to the defendant, that the person arrested was a fugitive, or was arrested as such."

The object of the arrest in the present case was avowed to be, to take the fugitives before a judicial officer. But the same principle applies where the arrest is made for the purpose of taking the fugitive by force out of the State, and without judicial sanction. This the claimant or his agent may lawfully do, under the Constitution of the United States, according to the doctrine laid down by a majority of the Judges in the case of *Prigg* v. *The Commonwealth of Pennsylvania*, 16 *Pet.* 539. This, then, as claimed, is no ordinary

power. It sweeps aside State laws and State sovereignty, and enables an individual who claims to act as agent, to take any person, white or colored, as a fugitive from labor, without any exhibition of his personal authority, or of the claims of the master.

The Constitution of the Union, and the laws made in pursuance of it, are declared to be paramount to the laws or Constitution of a State. But from this it does not follow that the remedy under the Federal power against fugitives from labor, being in the hands of the master, may be exercised without restriction and without regard to the rights of others. The common law doctrine of recaption is adverted to as authorizing this remedy, independently of the Constitution and the act of Congress. The right of recaption was limited to the sovereignty in which the right was sanctioned. Neither the laws of nations nor the common law authorize the master to recapture his slave beyond the jurisdiction in which slavery is sanctioned. The Constitution and the act of Congress give the remedy in this case.

It may be admitted as between the master, or his agent, and the fugitive, the inquiry would be, whether the master had a legal claim to the services of the fugitive. And if this claim were not sustained, the person making the arrest would be responsible in damages. The authorities above cited, from Baldwin's and Washington's Reports, seem to place the person who shall obstruct or hinder the arrest on the same footing, in this respect, as the fugitive. But we cannot assent to this view. The fugitive stands upon the fact of service; and if this be against him, by whatever means he may be returned to his master, he could recover no damages. But the defendant cannot be subjected to the penalty of five hundred dollars, under the act, unless he "knowingly and willingly" obstructed or hindered the arrest. This is called in the act an offence; and had not the statute given a civil action for the penalty, it might have been recovered by an indictment. Now, can an individual commit this offence unless he have reasonable knowledge, not only that the persons claimed are fugitives from labor, but that the person making the arrest has authority to make it.

The character of the fugitive may be made known by himself, or by those who arrest him: or the knowledge of the defendant may be inferred from circumstances. But the authority of the agent must be made known. If he act without authority, no person who "hinders" the arrest incurs the penalty. It is no answer to this to say, that such person acts on his own responsibility, and must meet the conse-

quences. He must act "knowingly," which presupposes a knowledge of such facts as authorize an arrest. If he act in ignorance of these facts, he does not act "knowingly."

Bail, it is said, may arrest their principal wherever he shall be found. This is admitted, because the principal, as a condition of the recognizance, is delivered to the custody of his bail. But they must have a bail-piece as the evidence of their authority to arrest him. "An officer acting out of his precinct, is bound to show his warrant." Lord Kenyon observed, "that he did not think a person is bound to take it for granted, that another who says he has a warrant against him, without producing it, speaks the truth." "It is, therefore, very important in all cases where the arrest is made by virtue of a warrant, that the warrant should at least, if demanded, be produced, to leave a delinquent no excuse for resistance. 1 *Chitt. Cr. L.* 51.

"If a warrant be defective, or the officer exceed his authority in executing it, if killed, it is only manslaughter; and any third person may lawfully interfere to prevent an arrest under it." 1 *East. P. C.* 310; *Leach* 206; 1 *Barn. & Cres.* 291. The agent in this case referred to his power of attorney, and was ready to produce it; but its production was waived by an objection to its sufficiency. Having acted under this power, must it not be produced in evidence? It is in the nature of process. In fact, it was the warrant of the agent. It having been given in writing, precludes the presumption that it was given by parol. Whatever conversation may have taken place between the agent and his principal on the subject of his agency, at length and as the last act, in accordance with legal advice, the power of attorney was executed. Now this power must speak for itself. It is as important as a warrant can be to an officer; and it would seem that in this action, which is brought to subject the defendant to a penalty, it must be produced, or its contents proved, after establishing its loss. This imposes no hardship on the master or his agent. It would be required in claiming an estray horse, found in the possession of any one.

The power may be defective. It may authorize the arrest on conditions which did not happen. Viewing then this power as process, and considering that the same principle must govern, whether the arrest be with the object to take the fugitive before a judicial officer to establish the right to his services, or to take him out of the State, we consider the power to be of high importance. The consequence resulting from its exercise is important to the fugitive, to the claimant, and to the State from whence he is taken. And as a

written power of attorney would impose a form to the proceeding, and tend to prevent abuse, we are strongly inclined to say, it is necessary to authorize an agent to make the arrest. But this point is not necessarily involved in the case, and we do not decide it. We think that the power in question, under the circumstances, must be produced or its contents proved.

Some evidence was given to prove the loss of the power; but nothing was shown from which its loss could be inferred.

The evidence of the plaintiff being closed, a motion for a non-suit was made, and the ground that the declaration charged the defendant with having "harbored and concealed" the fugitives, and not in the language of the act, with having "harbored or concealed them." It is alleged that these words are not synonymous, and that they are not so used in the statute, and that both allegations must be proved.

If the import of these words were different, as contended, still there is no ground for a non-suit. In the act, they are used in the disjunctive, so that, although they are alleged conjunctively in the declaration, the proof of either would sustain the action. In slander, it is now allowed to be sufficient if the plaintiff prove some material part of the words laid; and, if his count contain several additional words, he is entitled to a verdict on proving some of them. *Campagnon* v. *Martin*, 2 *W. Bl. Rep.* 790. If a plea in trespass aver two matters, either of which is a good justification, though both be put in issue by the replication, proof of one is sufficient. *Spitsbury* v. *Mirclethwaite*, 1 *Saund.* 146. So, where a declaration for a false return to a *fi. fa.* against the goods of two, averred that both had goods, it was held sufficient to prove that one had goods within the bailiwick. *Jones* v. *Clayton*, 3 *M. & S.* 349. So in an indictment, only so much need be proved as charges the defendant with a subsequent crime. *Rex* v. *Hunt*, 2 *Camp.* 583; *Rex* v. *Williams*, *Ib.* 646; 2 *East. P. C.* 515.

DEFENDANT'S EVIDENCE.

Mr. Barbour—who was present at the trial in the Court-House, at Sandusky City, and heard defendant relate the occurrences before his door, which were assented to by Col. Mitchell as correct, with the exception of the advance of the boy to shake hands with him, which was omitted by defendant.

This statement, thus assented to by Col. Mitchell as correct, did not contain any demand by him in relation to the arrest. He ad-

mitted that defendant said he was a law abiding man, and wanted only a fair and legal trial. And Col. Mitchell said that he did not complain of the defendant's acts, for that he had treated him as a gentleman. To this the defendant replied, that Col. Mitchell had acted like a gentleman.

Mr. Beecher—who was present at the Court-House on the same occasion, and heard the statements made by Col. Mitchell and the defendant, corroborates the relation made by Mr. Barbour—in some parts, stating the facts more minutely than he did.

Mr. Henry—heard only a part of the conversation at the Court-House. So far as he goes, he corroborates the statements of Barbour and Beecher, except, he has no recollection of hearing any thing said about a fair trial.

Col. Mitchell—being again called, says, he cannot recollect distinctly the words, at the various conversations had at the Court-House. He admits that he assented to the facts stated, as related by Mr. Barbour and Mr. Beecher, except the remark of the defendant, "that he was a law abiding man, and wanted only a fair trial;" which remark, he says, was not made before the defendant's door, but after that interview, and at a different place. He repeats, that at the first interview with the defendant, before his door, and in the presence of the colored persons, he claimed the right to arrest them as fugitives.

The above, gentlemen of the jury, is a concise, but substantial statement of the evidence in the case. As the Court have excluded parol proof of the authority of the agent, he having acted under a written power, the plaintiff does not rely upon the two first counts for "obstructing and hindering" an arrest. He relies upon the other two counts in his declaration, which charges the defendant with having "concealed and harbored the fugitives."

The action is founded upon the statute, which subjects any one "who shall conceal or harbor" a fugitive from labor, after notice that he is such fugitive, to a penalty of five hundred dollars. The language is in the singular number, and as the declaration charges the defendant with having harbored two fugitives, which the evidence has conduced to prove, the plaintiff claims the penalty of five hundred dollars in such case.

This construction of the act, the Court think, is not sustainable. There can be but one penalty for concealing or harboring at the same time, whether there be one or many fugitives. The act is a penal one, and was not framed with the view of giving a compensation to

the master for the injury done. In the same section which gives to the master this action for the penalty, it is added, "saving, moreover, to the person claiming such labor or service, his right of action for or on account of the said injuries, or either of them."

There can be no doubt, that the same individual may be convicted of "hindering" an arrest of the fugitive, and also of "harboring" him, which will subject him to two penalties, the acts being distinct, and at different times. But whether the "hindering" of the arrest, or "harboring," be of one or many fugitives, at the same time, the penalty is the same. It is the act of "concealing" the fugitive, or for "obstructing" his arrest, that is punished. If this penalty were to be enforced by indictment, as might have been provided, the act must have received the same construction. An individual who counterfeits the coin of the United States, is liable to be punished, whether he counterfeit one piece or many pieces. So for stealing one or many articles of property. The punishment, in some cases, is inflicted under the exercise of a limited discretion of the Court; but where the offence is stealing one or many letters, by a Postmaster, from the mail, the punishment cannot be less than ten years' confinement in the Penitentiary. Where the punishment is fixed, the Court can exercise no discretion. If the defendant be guilty in this case, neither the Court nor jury can exercise any discretion in regard to the penalty.

The charge against the defendant is, that he "harbored and concealed" the fugitives in question, after notice that they were fugitives.

That notice, in this relation, means knowledge, has been decided by the Supreme Court. And, from the evidence, it would seem that the defendant was informed by the agent, who held a power of attorney from the master, that the colored persons were fugitives from service. It is also inferrible from the conversation of Jane with the witness, in the presence of the defendant.

Did the defendant harbor or conceal the fugitives? To answer this inquiry, we must understand what is the true import of the words, "harboring or concealing."

By Worcester, the word is defined, "to entertain; to shelter; to rescue; to receive clandestinely, and without lawful authority." By Webster, "to shelter; to rescue; to secrete; as to harbor a thief." Worcester defines the word conceal, "to hide; to keep secret; to secrete; to cover; to disguise." And Webster—"to hide; to withdraw from observation; to cover or keep from sight."

It is insisted, that any one who shall permit a fugitive from labor,

after notice that he is such fugitive, to enter his house, and remain for any time, is liable, under the statute, for harboring or concealing him; and that the intention with which the act is done is of no importance, as the act constitutes the offence.

This position as laid down is unsustainable. The intention with which an act is done, gives the character of guilt or innocence to the act. Homicide may be committed innocently. If, in the performance of a lawful act, and without any intention to do evil to any one, by shooting at a mark or otherwise, a person should be killed, no crime is perpetrated.

An officer arrests a fugitive from labor for debt, or a breach of the peace, and retains in his custody such fugitive: the penalty is not incurred. So, if the fugitive be stricken down by sudden disease, and a person, through motives of humanity, shall take him to his house, and endeavor to alleviate his distress, no offence is committed. So if an individual shall seize a fugitive from labor, without authority, with a view of returning him to his master, and, in the act of doing so, the fugitive should escape, it would hardly be contended that, for such an act, the master can claim the penalty. And if an individual employ a fugitive from labor, with the view of detaining him until notice can be given to his master, and he gives the notice, but the fugitive escapes, is the individual guilty of "harboring or concealing" him under the statute?

These cases are put, because the counsel for the plaintiff will not controvert them; and they show that the intention must enter into and give a character to the act of harboring or concealing a fugitive, the same as in every other act of good or evil, of innocence or guilt. This is the great criterion of human judgment, and, as we believe, will be the criterion of man's final destiny.

The words, "harbor" and "conceal," were not used in the statute as constituting two distinct offences, but as descriptive of the same offence. All our statutes abound with unnecessary verbiage. It would be impossible for an individual to conceal a fugitive who might not be charged with harboring him, in the sense of the statute. In 1 *Chitt. Gen. P.* 567, cases are referred to where it has been decided, that the employment of an apprentice after notice, is a harboring of him, which gives an action to the master for his wages. The master is entitled to his labor, and, consequently, when he labors for another, who has notice that he is an apprentice, the

employer is bound, on equitable principles, to pay the master. But the foundation of the action under consideration is an offence, so denominated in the act, and for which a penalty is inflicted.

To harbor or conceal a fugitive from labor, within the meaning of the statute, it must be done with the view to elude the claim of the master. If a shelter be afforded to the fugitive for an hour, a day, or a week, when there is manifestly no design to conceal him from pursuit of the master or his agent, or in any way to defeat the legal right of the master to his service, there is no violation of the statute.

The intention is ascertained from the nature and circumstances of the acts done. From these, no unbiassed mind can fail to form a just opinion. Has the conduct of the defendant been fair, open, and such as becomes an individual who respects the laws of his country? Has it been consistent with a desire to give effect to the law, by an impartial inquiry? If these can be answered in the affirmative, he is not guilty. On the contrary, if he harbored the fugitives after he had notice that they were fugitives from labor, so as to defeat the claim of the master, or in a way that was manifestly designed to defeat it, he has incurred the penalty.

Gentlemen, it is not our province to consider abstract principles in regard to slavery. We deal with legal rights and established law. From these we cannot depart, without a violation of our duty.

The jury retired, and after having been out several hours, returned into Court, and declared they could not agree. The Court discharged them, and continued the cause.

DECISIONS OF THE COURT IN BANK, 1846-7.

[By W. M. Corry.]

Bosuell's Lessee v. Sharp.

In the ejectment below, the plaintiffs established a *prima facie* right to the premises. The defence then turned on certain Chancery proceedings, which, it was insisted, had divested the title of the plaintiffs, and were, therefore, an answer to their action. The Court say:

"The bill upon which the decree was pronounced, set up that complainant and respondents had entered into a contract with each other to build a mill; some to furnish money, and some to contribute labor, for which a compensation was to be estimated in money; and that finally, on acquiring title to the land, (which was, at the time of the contract, in the government,) the complainant was to have a certain portion of it; that respondents obtained the title, and refused, in any sense, to comply with the contract; and the complainant sought relief by a specific execution of the contract, and by an account for money more than his share expended, and for improvements put upon the land."

The defendants were nonresidents; and it was ordered that "*notice of the pendency of the suit*" be published in the Columbus Statesman for nine weeks successively; which was done.

A decree by default was taken, and the case was referred to a master to state an account. He reported a sum due to the complainant from the defendants, which the Court decreed accordingly; and directed execution as upon a judgment at law. An execution issued in the usual form against the goods, chattels, lands and tenements of the defendants, and was levied on the premises, which were sold, and defendants claim under the purchaser.

The seventh section of the statute of 1824 provided, that if some the defendants resided in the State, and others lived out of the State, the nonresident defendant should be considered in Court after personal service, or proof of the publication of a special notice of the pendency of the petition, and *the substance of the prayer* thereof, for nine successive weeks, in an Ohio newspaper of general circulation in the county.

The twelfth section of the same law provided, that the Common

Pleas for the county as a Court of equity might compel the specific performance of contracts relating to lands, against nonresidents, upon a proper petition filed; and the Court was authorized to proceed with the case after personal notice to the defendant, or after proof of notice, by newspaper publication, of the pendency of the petition, to be given according to the provisions of the act.

Two propositions were made for the plaintiffs on this writ of error.

First: that the Common Pleas had no jurisdiction to render a decree *in personam* for damages against the defendants in the Chancery suit; but were confined to a decree disposing of the land only, and that the actual decree was, therefore, void and no defence.

Secondly: that if the Court in a case properly brought before them had the right to adjudicate as they did, still, in this case, they could exercise no jurisdiction at all, because of the want of the statutory notice prescribed by law in lieu of the service of process; and so the decree was no defence.

On the first proposition the Court held, per READ, J.:

"If a bill in Chancery be filed against nonresidents in the county where the land lies, to enforce the performance of a contract for the conveyance of the same, and for an account for money expended and labor performed in improving the land, and the Court render a decree merely for the payment of money, the decree, if erroneous, can only be corrected by bill of review, and cannot be impeached collaterally in an action of ejectment. A purchaser at a sale under such decree acquires a good title."

The learned Judge asserts that the Court below pronounced a "wrong decree" only, and asks what more is it than error which never goes to the jurisdiction of the Court? Granting, he means, that there should have been a decree for specific performance of the contract, still a decree against the defendant for the payment of a sum of money only, is merely erroneous, and presents the precise case for the application of a bill of review.

The argument of the defendant's counsel was, that the proceedings of Courts of general jurisdiction, *while exercising their ordinary functions*, should be sustained by the most favorable presumptions. That when a petition is filed in the proper county, the words of the statute that the Court shall take cognizance, confer jurisdiction on the tribunal to pronounce any sort of a decree, subject only to be re-examined on error. *A fortiori*, that the additional power to order notice gives complete jurisdiction to *some* purposes, against the ex-

ercise of which a bill of review is the only check. To this point are sundry long quotations from the Supreme U. S. Court Reports about jurisdiction, which are scarcely applicable, and do not assist the argument. As thus, the last quotation: "*When a Court has jurisdiction*, it has a right to decide any question that arises in the cause; and whether the decision be correct or not, its judgment, until reversed, is regarded as binding in every other Court."* 1 *Pet. R.* 340.

The argument for the plaintiff by his counsel was, that at common law, bills for specific performance could not be prosecuted at all unless the defendant was personally served. That it was competent for the Legislature to alter the rule of the common law as to notice; but that the alteration when made, was the arbitrary rule for all Courts high and low. That any Court in such a case must be limited to the terms of the enactment, on pain of total disability. And finally, that conceding the Court below to have had jurisdiction under an imperfect notice, it had no authority to decree damages. The statute in question did not attempt to confer that jurisdiction; and if it had, the Legislature were incompetent to do so, because it is contrary to the great principle, that in cases of non-service and non-appearance, no personal judgment can bind the defendant. Demands of a personal nature follow the party wherever he goes, and are to be enforced according to the law of the country where he is found. He refers to 3 *Phil. Ev. Cowen and Hill's Notes, Part* 2, *p.* 908, to the very case in hand, "where notice was given by publication in the newspapers, as is frequently done in certain Chancery proceedings in several of the States, to bring in some partners who are absent, held, that a decree pursuant to notice of that character, as against such absent defendants, was no evidence of indebtedness."

I should presume from this short abstract of the arguments, that there could be no two opinions on the conclusion to treat the decree of the Common Pleas as a thing not even available in evidence—as a nullity. And it is some satisfaction to know, that out of the immediate atmosphere of the Court in Bank, this is the enlightened opinion of the profession. Indeed, further, that the point has been since ruled adversely to this decision in the very

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* The paragraph goes on to recognize the plaintiff's doctrine expressly, and in these unquestionable terms: "But if it (the Court) acts without authority, its judgments and orders are regarded as nullities. They are not voidable, *but simply void and form no bar to a recovery sought, even prior to reversal, in opposition to them.*

case itself by Judge M'Lean, upon the same question involving this very title, and pending in his Court between other defendants. This decision took place at the last July term of the Circuit Court U. S. for this District. The learned Judge was there pressed with the authority of the case of *Bosuell* v. *Sharp*, but pointedly disavowed its force, and gave judgment for the plaintiffs in the action.

On the second proposition, the Court also held that:

"The subject matter of the suit being within the jurisdiction of the Court, the defendants may be made parties by publication, and, if notice be thus given, *and the Court pass upon the sufficiency of the notice*, the same cannot be questioned collaterally."

This extract from the syllabus, is thus stated and sustained by the following paragraphs in the conclusion of the opinion:

"But, it is said, the Court has no jurisdiction, because there was not sufficient notice to respondents of the pendency of the suit by publication.

"The objection taken is not that no notice was published, but that the notice published was not full enough.

"It is claimed that the statute required notice to be given, by publication, of the pendency of the bill, and of the substance and prayer thereof.

"The notice actually given, was, that a bill in Chancery was pending, and a prayer for a decree. The Court had directed the notice, in pursuance of the 7th and 12th sections of the act of 1824. The Court regarded this publication as a compliance with the order made under the statute. The publication made was in the common or usual form adopted at that day, or at least, in a form quite common.

"Now, if there had been no notice at all, the objection would have been well taken. But as there was notice, *adjudged to be sufficient by the Court ordering it, we will not disturb it collaterally.*"

The defendant's counsel argued that notice of the pendency of the petition satisfied the terms of the twelfth section, although the seventh section requires another thing in addition, which was a statement of the substance of the prayer. But further, admitting *arguendo*, that the notice in all cases must comply with both those requisitions instead of one, that was done, as the notice actually contained the substance of the bill, by demanding a decree.

There are two other arguments, not very cogently put nor intrinsically sound. The first is *ab inconvenienti*, and depends on considering the case not as one for a specific performance, but a case of

partnership in reality, which is not specially mentioned by the act concerning notice. The last is that because Chancery Courts in extreme cases have the right to prescribe the mode of service, they may here disregard an enactment on the subject.

It will be observed that the Court very properly, by their decision, refused to adopt either of these alternatives. They held that the statute required in terms a notice of the pendency and of the substance of the petition, and that it had not been complied with in the latter particular; but decided that the omission was not material. Though not clearly expressed, the decision neutralizes the Legislative enactment that the notice shall contain the substance of the bill. And the learned Judge gives as a reason for saying that such a notice in lieu of the service of process shall be good, although not authorized by statute, *because the Court below pronounced it sufficient.* This is contrary to principle and authority.

As to the argument that the Court below was to determine whether valid notice had been given, the obvious reply is, that every Court determines, before it proceeds to judgment, that it has jurisdiction over the parties in an ordinary proceeding by the necessary citation. But such determination has never been held to exclude the enquiry, whether jurisdiction over the person was actually obtained, as required by law. This is the only practical restriction upon the power of the Courts over nonresidents: for if that be removed, they are absolute, so far as property held by such persons is concerned. Indeed, the doctrine strikes at the root of all rights of ownership, however situated and in whomsover vested.

The way to test the principle, is to push it one step further. and to suppose that the Court below, had decided that the Legislature were foolish to require any newspaper notice at all, and had deprived the owner of land of his property without even that constructive citation. Such a mockery of judicial proceedings comes fairly within the reasoning of the learned Judge, and quite as loudly demands the sacrifice of a defendant, as the actual case. All this judicial dereliction is "to give confidence to the judicial action of the country, and protect those who have made purchases upon the faith of judicial sales."

Upon authority, the refuge taken by the learned Judge in the blunder of the lower Court, is equally untenable. In *Part 2 of Cowen & Hill's Notes to Phillips on Evidence, pp.* 825, 826, the notion that the assumption of jurisdiction by the inferior Court is conclusive. is altogether disavowed, a d the cases cited. The authors say:

"The law, proceeding upon the maxim that '*interest reipublicae ut sit finis litem*,' will regard them (judgment and decree) as conclusive upon all points directly involved in them, and necessarily determined. And, whether the tribunals recording them are clothed with limited or general powers—whether they are Courts of record or otherwise—makes no sort of difference; so long as they act within the sphere which has been assigned them, their adjudications are binding upon the parties in all future controversies relating to the same matter. But note, that all which is said as to the conclusiveness of a former judgment, must be understood with this proviso: that the Court rendering the judgment had jurisdiction; for, if a Court transcends the limits which the law has prescribed for it, and assumes to act where it has no jurisdiction, its decisions will be utterly void, and entitled to no consideration, either as evidence or otherwise." *Borden* v. *Fitch*, 15 *J. R.* 121; *Mills* v. *Martin*, 19; *Ib.* 33; 3 *Phil. Ev.* 801; *cum multis aliis.* "A want of jurisdiction in the Court pronouncing it (decree or judgment) may always be set up, where it is sought to be enforced, or where any benefit is claimed under it; and the principle which ordinarily forbids the impeachment of a record has no sort of application." Again, *p.* 904: "Every Court, either expressly or by implication, passes upon the question of its own jurisdiction, whenever it renders judgment; and to say that because it has so passed upon it, there shall be no further examination into the point, would be paying to foreign judgments a more deferential regard than is allowed even to domestic judgments." *Story, Conflict of Laws*, § 209. The first section of fourth article *Constitu. U. S.*, requiring full faith and credit in all Courts for the judicial proceedings of other States, &c., "does not prevent an inquiry into the jurisdiction of the Court in which original judgment was rendered, to pronounce the judgment," &c.

Besides the references in *Phil. on Ev.*, *Cowen & Hill's Notes*, *ut supra*, there are later cases in New York and Massachusetts affirming the same proposition. I can only refer to *Bates* v. *Delavan*, 5 *Paige* 299, and *Watson* v. *Spencer*, 20 *Wend.* 265; and to *Gleason v. Dodd*, 4 *Metcalfe* 333, citing *Hall* v. *Williams*, 6 *Pick.* 232, with approbation.

The decisions of the U. S. Supreme Court affirm the right to impeach judicial proceedings collaterally, where there has been no jurisdiction. The doctrine of 1 *Pet.* 340, already quoted, is recognized by Judge Johnson in 2 *Pet.* 165, as follows: "When there has been a fair sale, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the Court jurisdiction appear on the face of the proceedings." In the late case, also, of *Shriver's Lessee* v. *Lynn*, 2 *How. Rep.* 43, it was held that "a sale ordered by a Court in a case where it had not jurisdiction, must be considered

as inadvertently done, or as an unauthorized proceeding; and in either branch of the alternative, as a nullity." (Per Judge McLean, p. 60.) "No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law. It must obtain jurisdiction of the thing in a legal mode. A decree without notice would be treated as a nullity."

In the late case of *Hickey* v. *Stewart*, 3 *How. Rep.* 751, the doctrine 1 *Peters*, 340, was reviewed and confirmed, viz: That the jurisdiction of any court exercising authority over a subject, may be enquired into in every other court where the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceeding.

The case of *Hunt* v. *Wickliffe*, 2 *Pet.* 201, is also to the point. Per *C. J. Marshall*, p. 214. The laws of Kentucky authorize their Courts in Chancery to make decrees against absent defendants, on the publication of an order, such as was made in this case by the Circuit Court of Fayette county, for two months successively, in some paper authorized to make the publication, and in fixing it up at certain public places prescribed by the act. This publication is considered as a constructive service of the process. The Court of Fayette county obviously supposed a publication for eight weeks to be a compliance with the law; but we understand the Supreme Court of the State has declared otherwise. That tribunal has decided that the publication must be continued for two calendar months. Under this construction of the act, the heirs of John Floyd were never before the Court, and the decree was made against persons who were not parties to the suit. It cannot affect them.

But we have an array of Ohio cases on this question of jurisdiction, which are overturned by the reasoning and decision of the learned Judge, under consideration. He holds that if the court below make an order in a Chancery case, pursuant to which a notice is given in different terms from the statutory, the existence of that element of jurisdiction must nevertheless be taken for granted. If that be so, the decision in *Adams' Lessee* v. *Jeffries*, 12 *O. R.* 271, would be erroneous, for the Court of Common Pleas for Franklin county, must, in that case, have decided in making the order of sale that the parties were properly before the court. As observee by Judge Collett in *Ewing* v. *Higby*, 7 *O. R.* 1 pt. 198 the Common Pleas when they made the order must have determined that matter. Indeed, they could not get along without. Therefore the court in Bank, 12 *O. R.* 271, say that the "want of jurisdiction may always

be shown, as it renders the act done void, or unavailable for every purpose." And so in the case of *Maxsom's Lessee* v. *Sawyer* 12 *O. R.* 195, the Common Pleas authorizing one represented to be a guardian to sell a minor's lands, must have determined that he really was the guardian; yet it was held that the enquiry might be made when the minor brought his action of ejectment. In *Sullivant's Lessee* v. *Weaver*, 10 *O. R.* 275, a decree against unknown heirs was relied on by the defendant. The question was whether there had been an affidavit, as required by the statute, that the heirs were unknown. PER CURIAM: "A substantial compliance with the law is required." In *Perry's Lessee* v. *Brainard* 11 *O. R.* 442, it was held that a sale under an order of court, granted on the petition of one who was erroneously supposed to be a guardian, was void, and the purchaser at the sale was ejected. *Pelton* v. *Platner*, 13 *O. R.* 218: "If the court here or elsewhere, have not jurisdiction of the person nor of the subject matter, its proceedings are wholly void. Such judgments are as waste paper." In *Miami Ex. Co.* v. *Brown*, 6 *O. R.* 535, it was held that a judgment of the Common Pleas in favor of the plaintiff, upon a short statutory notice, is *coram non judice*, and void, unless the record show a notice regularly made and served. In *Smith* v. *Pratt*, 13 *O. R.* 550: "If a court falsely assume the existence of the fact on which their jurisdiction depends, and carry into the record their finding of its existence, the proceedings, although void," &c. In *Warner* v. *Webster*, 13, *O R.* 506: "The notice of the pendency of the suit in attachment required by the statute, was not given; hence, the judgment and proceedings on the sale were void, and Webster acquired no title by his purchase at the sale had under the judgment in the attachment suit."

In all these cases, the court below impliedly decided, as the learned Judge in *Boscull* v. *Sharp* assumed it to have done, that the jurisdictional facts existed; and yet, how different has heretofore been the opinion, not of lawyers only, but of the Court of last resort under the Constitution, of the effect of that implication; how disastrous must be the change?

It will not do for the Court in Bank to assume to perpetuate wrong, either *per se*, or vicariously, according to such desolating precedents as we are now considering. The Judges are not in theory absolute; nor is any tribunal oracular and irresponsible to the higher power of the law, which it disregards.

Courts are limited in the exercise of their powers as well as Legislatures, and it is not correct to say that "a Court can do no

wrong." I admit that however erroneous, base, or outrageous may be the proceedings of Courts, having the parties legally before them, and full jurisdiction over the subject matter, the judgment, order, or decree, cannot be collaterally impeached in proceedings against purchasers, although the rights of infants, married women, or lunatics, may have been divested, and there is no appeal, or writ of error, nor any other remedy whatever. But to hold that a man's property may be snatched from him, without giving him even a constructive opportunity to be heard, as required by the laws of his country, would be a violation of what C. J. Marshall has declared to be a principle of universal obligation.

Instead, then, of following the authority of the learned Judge, and giving to every County Court, the *jus disponendi* over all the property of individuals according to its discretion; a very different line of responsibilitv should be prescribed and enforced against them.

I propose to the profession the following ideas upon the subject of the jurisdiction of Courts in Ohio, which seem at this moment and in this place, both pertinent and reasonable. It will be considered not superfluous to cite some cases to sustain each proposition. The importance of the errors every day committed in fundamentals by our Courts, induces me to insert them in this article. I shall have much to say of them hereafter.

As to presuming and proving jurisdiction, and as to proof of the want of jurisdiction, the rules appear to be as follows:

1. A Court of general jurisdiction, acting as such, and not under summary powers, contrary to the course of the common law, will be presumed to have acquired jurisdiction, if there be no law requiring the record to set forth the process, &c. But if the record do not show jurisdiction, evidence is admissible to show that there was none. 3 *Phil. Ev.* 905; *Bloom* vs. *Burdick*, 1 *Hill* 139.

2. When a Court is acting in pursuance of a special power, conferred by statute, to be exercised contrary to the course of the common law, the record must show jurisdiction, or it must be shown by parol evidence, or otherwise, that jurisdiction was acquired. 12 *O. R.* 272; 3 *Phil. Ev.* 906, 946, 863; 7 *O. R.* 248; 1 *Hill* 140; 2 *Dana* 270.

3. Evidence is admissible to show the falsehood of an express allegation in a record, finding the existence of a fact, on which jurisdiction depends IN ANY COURT, no matter how organised, or acting.

Upon this last point there are conflicting decisions. 3 *Phil Ev.*

800; 13 *O. R.* 550; 11 *O. R.* 442; 12 *Wend.* 102. But it appears clear on principle, that even an express allegation in the record of a Court of general jurisdiction of the "*jurisdictional facts*," as that one has been served with a process, who has not been so served, should not conclude him. It may be said that he may appeal, or bring a writ of error. That supposes him to have had notice of the proceedings within the time limited for such relief, and to have been under no disability. An express adjudication in a suit between third parties, that A's lands belong to the defendant should not affect the owner. The proceedings must be in such case void for want of jurisdiction, and A. is not confined to his appeal or writ of error. 1 *Pet.* 340; 3 *How.* 750. Such is the New York and Ohio doctrine, as well as the doctrine of the Courts of the United States, though there are decisions to the contrary in some of the States. All authorities however concur in allowing the other averments of a record in any Court not going to the jurisdiction, to be contradicted by testimony, and there does not seem to be any good reason why the averment of jurisdictional facts should be conclusive.—The proposition that a man may be deprived of his lands by decision of a Court in an adversary proceeding, without the owner being allowed a day in Court, by actual service of process, or by some substitute affording him a fair opportunity of being heard where there is no statute, or according to some express statute, cannot be sustained for a single instant.

But if these and all other rules in restraint of jurisdiction, and modifying absolute power of the Courts to transfer property *in invitum* from hand to hand are to be set at defiance, a decent cover for the usurpation might be asked of the representatives of the people. Greater confidence in the Courts would be conferred by a simple enactment, that the individual has no natural rights approaching in dignity or importance the adventitious rights of officers of the government, especially the Judges. That the citizen may properly be deprived of his property and his liberty by new and unheard of proceedings, which have the merit of directness and simplicity. That a trial is a formality which should go out of fashion, and the ancient prejudice in favor of hearing a man before judgment ought to be exploded as a miserable fallacy. These simple reforms by the Legislature would "give confidence to the judicial action of the country," which holds the old errors on the subject in deserved contempt, and we should set forward for the enjoyment of an era unrivalled in preceding ages of jurisprudence.

JUDICIAL DAYS—SUNDAY.

A recent decision in a capital case, in the Supreme Court of Illinois, (*Baxter* v. *The People*, 3 *Gilman* 368,) upon the right of a Judge to perform a judicial act on Sunday, has led to an investigation of the law on that subject. It is a question of some interest, not frequently arising, but often involving important consequences. In this case, the life of a fellow being was at stake, and the ultimate decision of the Court was not the least important of the circumstances which finally saved his life.

The leading case upon the subject is that of *Swan* v. *Broome*, 3 *Burr.* 1595, before Lord Mansfield. The point there was, whether a valid judgment could be rendered on Sunday. The learned Judge said, that no express direct authority had been cited in support of the affirmative; that the authorities cited were *merely argumentative.* His Lordship said, however, that "the history of the law and usage, as to Courts of Justice sitting on Sundays, makes an end of the question." That history will be briefly stated.

In early times, it was customary for Courts to sit on Sunday. Sir Henry Spelman states, that "the Christians, at first, used all days alike for hearing of causes, not sparing (as it seemeth) Sunday itself." There were, it appears, two reasons for so doing: first, as it was opposed to the custom of the heathen, who, on account of their superstition, entertained a belief in lucky and unlucky days; and second, by observing all days alike, Christian suitors were not compelled to resort to the heathen tribunals. In the year 517, a canon of the Church was interposed in behalf of the day, which canon was ratified by Theodosius, who, as his Lordship informs us, "fortified it with an Imperial Constitution." Afterwards, in the years 895 and 932, other enactments in council, amounting to a total prohibition of judicial proceedings on that day, were made a constituent part of the canon law. Subsequently the Saxon Kings adopted them, and being confirmed by William the Conqueror, and Henry the Second, they became a part of the common law of England. In later times, however, when Parliament began to legislate upon the subject, the rigor of the rule was somewhat relaxed by the statute of Westminster 1. 3 *Ed.* 1, which dispensed with other days once unjuridical.

In the case of *Becloe* v. *Alpe*, *Sir Wm. Jones* 156, it was held, that although Sunday "was not a *dies juridicus* for the award of any judicial process, or to make any entry of any judgment on record, yet it

was good for accepting an information upon a special law." The reason given for this was, that "the awarding of process, and the giving of judgment, were *judicial* acts, and therefore cannot be supposed to be done, but *whilst* the Court is actually sitting."

In *Mackalley's case*, 9 *Coke* 66, to the objection that Sunday was not *dies juridicus*, it was answered, "that *no judicial act* ought to be done on that day, but *ministerial* acts may be lawfully executed."

In *Hoyle* v. *Lord Cornwallis*, 1 *Strange* 389, which was a case where a writ of inquiry appeared to have been executed on a day, which, on reference to the almanac, appeared to be Sunday, it was held, "that the execution of the writ on a Sunday was void." This decision was based on the 29 *Car.* 2, *c.* 7, which made the service of all process on that day, except for treason, felony, or breach of the peace, unlawful.

The law, as laid down in *Mackalley's* case, appears to have been adopted in this country, in the absence of special statutory regulations.

In Massachusetts, the doctrine is recognized incidentally, (*Pearce* v. *Atwood*, 13 *Mass.* 324,) though the case before the Court was determined upon a construction of their statute of 1791, *c.* 58.

In New York, several cases have been before its highest court for adjudication. In *Hoghtaling* v. *Osborn*, 15 *Johns.* 119, the Court say: "It was proper to receive the verdict on Sunday, presuming the jury were impanneled before Sunday commenced, but it was illegal to render the judgment on Sunday." In *Butler* v. *Kelsey* 20, 178, an inquisition taken on that day was set aside. In *Story* v. *Elliot* 8, *Cowen* 27, the various decisions of the English courts before referred to, were cited, and the doctrine there laid down adopted to its full extent, that no judicial act could be performed on Sunday. The case at bar was debt on a bond for the performance of an award made and published, as it appeared, on Sunday. The courts of that State had previously decided that an award of arbitrators was a judicial act, and judgment was given for the defendant.

In New Hampshire, the court said, in *Frost* v. *Hull*, 4 *N. H.* 158, that "it has long been settled that no judicial act can be done on Sunday."

In Indiana, Blackford J., in giving the opinion of the court in the case of *Chapman* v. *The State*, 5 *Blackf.* 111, said: "Sunday is *dies non juridicus*, and by the common law, all judicial proceedings which take place on that day are void." He refers to the case of *Arthur* v. *Mosby*, decided by the Court of Appeals in Kentucky, (2 *Bibb* 589,) among others above cited, where the verdict of the jury was made up, returned into court, and judgment rendered thereon after twelve o'clock on Saturday night. The Court say: "The judicial power of the Court was limited to the preceding day. After midnight, another

day had commenced, a day not judicial in our law, and on which our courts are not authorized to sit and adjudicate. It follows, therefore, that in either view the proceedings and judgment of the Court after midnight, and the beginning of another day, (excluded in the computation of our judicial days,) were not authorized by law."

In South Carolina, a still more rigid rule was laid down in the case of *Shaw* v. *McCombs*, 2 *Bay* 232, where the Court held that a verdict rendered on Sunday morning was void. It was there said, that "it is a well set down rule of the law, *dies Dominicus, non est dies juridicus;* consequently, all temporal business transacted on that day, is null and void, as it is set apart by our holy religion for the worship of the Almighty, and the necessary preparations for that purpose. The Court might sit till the last minute of the twelfth hour, but no longer."

In Alabama, *Goldthwaite*, J., in delivering the opinion of the Court in the case of *Nabors* v. *The State*, 6 *Ala.* 203, said: "The remaining question is one of considerable importance in its connection with public morals, but more so with reference to the administration of criminal justice. The position assumed by the prisoner's counsel, is, that the Circuit Court should have discharged the jury from the further consideration of this case upon the coming of the hour of twelve o'clock on Saturday night, as the Sabbath then commenced, and the term expired by its legal limitation." "This day, from a remote period, has, by the common law, been regarded as *dies non juridicus*, and we have been able to find no precedent where a judicial act has been sustained, if done on that day." "Where the Court is limited to one week, as no judicial act can be performed on Sunday, the term necessarily expires at the hour of twelve o'clock on Saturday night; and, in this case, when that hour arrived, nothing remained of the powers of the court but those necessary to declare that its functions had ceased, and to remand the prisoner."

In the case alluded to in Illinois, the trial of an indictment for murder, the jury returned their verdict of "*guilty*," and judgment was pronounced thereon by the Court on Sunday. The Supreme Court declared the judgment absolutely null and void, but sustained the verdict. The cause was remanded, with a *procedendo* to the Circuit Court, to render the judgment of the law upon the verdict of the jury.

Two or three cases, holding a contrary doctrine to that laid down in the case of *Shaw* v. *McCombs*, are cited in 3 *U. S. Dig.* 635, § 220; but, as already stated, the doctrine of *Mackalley's* case obtains, and may be considered the settled law, both in England and in this country, and that is, that acts *strictly judicial* cannot be legally performed on Sunday, but *ministerial* acts, such as the receiving of a verdict, &c., may be.

Miscellaneous.

Thornton on Conveyancing. [A Digest of the Conveyancing, Testamentary and Registry Laws of all the States of the Union; embracing References to the leading Decisions upon these Subjects in most of the States, together with the Forms of Acknowledgment, Probate Relinquishment, &c., required by the Statutes of and in use in each; preceded by a brief Treatise on the general Rules relating to the Nature, Execution, and Operation of Deeds and Wills; and followed by an Appendix of the most approved general Forms of those Instruments; being a Practical Manual and Guide for Lawyers, public Officers, and Men of Business. By James B. Thornton, late of Virginia, now of Memphis, Tennessee, Attorney at Law. Philadelphia: T. & J. W Johnson—1847.]

Such is the title of this book, which sufficiently explains its object. A very difficult task the author proposed to himself; and a very useful book would be the result of an accurate performance of that task—useful, we mean, for the immediate present; for a treatise, perfectly accurate now, as to all the States, might not be so as to any one, after the next meeting of its Legislature, or session of its highest Court. So far as we have had time and opportunity to test Mr. Thornton's accuracy, we think he has well performed his task. With respect to Ohio, we can speak with confidence. With respect to other States, we can give no opinion. But if, by pointing out discrepancies for which there is no good reason, Mr. Thornton shall have succeeded in exciting attention to a greater degree of uniformity in State legislation, on matters which concern all property holders alike, he will deserve well of the public.

Mode of Swearing a Chinese Witness. Two persons were indicted for assaulting one Assang, with intent to do him some grievous bodily harm. They were tried before Mr. Baron Gurney and Mr. Justice Wightman. Assang was a Chinese, and not understanding the English language, an interpreter was sworn, and in reply to a question by the Court, said that he was acquainted with the mode of administering an oath to a Chinese witness, and described it in the manner in which it was afterwards administered, adding that he had frequently seen it so administered, and believed it to be binding in that form.

Assang was then called, and on getting into the witness box, immediately knelt down, and a China saucer having been placed in his hand, he struck it against a brass nail in front of the box, and broke it. The crier of the Court, who swears the witnesses, then, by the direction of the interpreter, administered the oath in these words, which were translated by the interpreter into the Chinese language:

"You shall tell the truth, and the whole truth: the saucer is cracked: and if you do not tell the truth, your soul will be cracked like the saucer." 41 *E. C. L.* 140.

C.